

Senate Inquiry into Indefinite Detention of People with Cognitive and Psychiatric Impairment in Australia

Legal Aid NSW Submission

to the

Senate Community Affairs References Committee

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About Legal Aid NSW

The Legal Aid Commission of New South Wales (Legal Aid NSW) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW) to provide legal assistance, with a particular focus on the needs of people who are economically or socially disadvantaged.

Legal Aid NSW provides information, community legal education, advice, minor assistance and representation, through a large in-house legal practice and private practitioners. Legal Aid NSW also funds a number of services provided by non-government organisations, including 35 Community Legal Centres and 28 Women's Domestic Violence Court Advocacy Services.

The Legal Aid NSW specialist Mental Health Advocacy Service (MHAS) provides representation to civil patients under the *Mental Health Act 2007*, forensic and correctional patients under the *Mental Health (Forensic Provisions) Act 1990* and people under the *Guardianship Act 1987*.

For civil patients, the MHAS represents people in proceedings before the Mental Health Review Tribunal (MHRT) including mental health inquiries, reviews, applications for community treatment orders and financial management orders.

For forensic and correctional patients, the MHAS represents people at reviews before the MHRT, appeals at the Supreme Court or the Court of Appeal, and applications for extension of forensic patient's status before the Supreme Court.

This submission has been prepared by specialist lawyers of the MHAS of Legal Aid NSW.

Legal Aid NSW welcomes the opportunity to respond to the Senate Inquiry into Indefinite Detention of People with Cognitive and Psychiatric Impairment in Australia.

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Summary of the terms of reference addressed in this submission

For the purpose of the Senate Inquiry into Indefinite Detention of People with Cognitive and Psychiatric Impairment in Australia, we limit our submissions to the New South Wales jurisdiction, and confined to the following terms of reference.

1. The indefinite detention of people with cognitive and psychiatric impairment in Australia, with particular reference to:
 - a. the prevalence of imprisonment and indefinite detention of individuals with cognitive and psychiatric impairment within Australia,
 - d. the impact of relevant Commonwealth, state and territory legislative and regulatory frameworks, including legislation enabling the detention of individuals who have been declared mentally-impaired or unfit to plead,
 - j. the availability of pathways out of the criminal justice system for individuals with cognitive and psychiatric impairment, and
 - n. the prevalence and impact of indefinite detention of individuals with cognitive and psychiatric impairment from Aboriginal and Torres Strait Islander and culturally and linguistically diverse backgrounds, including the use of culturally appropriate responses.

Terms of Reference 1(a) and 1(d)

- a. The prevalence of imprisonment and indefinite detention of individuals with cognitive and psychiatric impairment within Australia.
- d. The impact of relevant Commonwealth, state and territory legislative and regulatory frameworks, including legislation enabling the detention of individuals who have been declared mentally-impaired or unfit to plead.

Forensic patients detained under the *Mental Health (Forensic Provisions) Act 1990* NSW (the Act) include people who have received a limiting term after being found unfit to be tried, people found not guilty by reason of mental illness (NGMI) and those under an extension order.¹ Civil involuntary patients are detained under the *Mental Health Act 2007* NSW (MH Act).

¹ Section 42 of the *Mental Health Forensic Provisions Act* provides:

For the purposes of this Act, the following persons are 'forensic patients' :

(a) a person who is detained in a mental health facility, correctional centre or other place, or released from custody subject to conditions, pursuant to an order under:

(i) section 14, 17 (3), 24, 25, 27 or 39, or

(ii) section 7 (4) of the *Criminal Appeal Act 1912* (including that subsection as applied by section 5AA (5) of that Act),

(a1) a person in respect of whom an extension order or interim extension order is in force,

(b) a person who is a member of a class of persons prescribed by the regulations for the purposes of this section

Indefinite detention as a forensic patient

Under the Act and MH Act, forensic patients can be indefinitely detained or face recurrent detention in four circumstances:

- A forensic patient found NGMI can be detained indefinitely before conditional release is considered.
- A limiting term patients can be re-classified as a civil involuntary patient during the last six months of their limiting term.²
- For a limiting term patient, there is no limit on the number of extension orders extending forensic patient status.
- A forensic patients who breaches a condition of release may be detained in a mental health facility or a correctional centre.

The pathways out of detention can be complicated for those with complex diagnoses.

² *Mental Health (Forensic Provisions) Act s 53*

Indefinite detention – recommended legislative change

The following proposals are aimed at facilitating change to the current legislative framework with the least amount of disruption to long standing practices and community expectations.

Not guilty by reason of mental illness (NGMI)

The issues

Upon being found NGMI by the Supreme or District Court, the accused is classified as a forensic patient (patient).³ The court may then order the person be detained in such place and manner as the court thinks fit.⁴ From that point onward, the patient's care, treatment and detention is determined by the MHRT, including when the patient is to be no longer detained.⁵

The patient may only be released from detention by the MHRT if the test set out in section 43 of the Act is satisfied. Initial release is subject to conditions, and referred to as conditional release.⁶ Later release is without conditions, and referred to as unconditional release,⁷ resulting in the ending of the patient's classification as a forensic patient.

Section 43 of the Act sets out the criteria for release and matters to be considered by the MHRT (Tribunal), and provides:

The Tribunal must not make an order for the release of a forensic patient unless it is satisfied, on the evidence available to it, that:

- (a) the safety of the patient or any member of the public will not be seriously endangered by the patient's release, and*
- (b) other care of a less restrictive kind, that is consistent with safe and effective care, is appropriate and reasonably available to the patient or that the patient does not require care.*

Section 74 sets out the matters that the Tribunal must consider in deciding what orders to make under this Part, and provides:

Without limiting any other matters the Tribunal may consider, the Tribunal must have regard to the following matters when determining what order to make about a person under this Part:

³ *Mental Health (Forensic Provisions) Act (1990) s42 and s25.*

⁴ *Mental Health (Forensic Provisions) Act (1990) s39 (1).*

⁵ *Mental Health (Forensic Provisions) Act (1990) s44 and 46.*

⁶ *Mental Health (Forensic Provisions) Act (1990) s47 (1) (b) regarding the MHRT's power to grant conditional release and s75 describes the conditions that may be imposed by the MHRT when conditional release is ordered.*

⁷ *Mental Health (Forensic Provisions) Act (1990) s47 (1) (b) regarding the MHRT's power to grant unconditional release and s51.*

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- (a) *whether the person is suffering from a mental illness or other mental condition,*
- (b) *whether there are reasonable grounds for believing that care, treatment or control of the person is necessary for the person's own protection from serious harm or the protection of others from serious harm,*
- (c) *the continuing condition of the person, including any likely deterioration in the person's condition, and the likely effects of any such deterioration,*
- (d) *in the case of a proposed release, a report by a forensic psychiatrist or other person of a class prescribed by the regulations, who is not currently involved in treating the person, as to the condition of the person and whether the safety of the person or any member of the public will be seriously endangered by the person's release,*
- (e) *in the case of the proposed release of a forensic patient subject to a limiting term, whether or not the patient has spent sufficient time in custody.*

Section 75 sets out conditions that may be imposed on release.

There is no time limit on when detention must end and so a forensic patient subject to a finding of NGMI may be detained indefinitely.

The prospect of indefinite detention is increased by the fact that the test as described at section 43 is a negative proposition. Release from detention cannot be granted unless the MHRT is satisfied, on the balance of probabilities, that release will not seriously endanger the patient or the community. Such release is invariably granted subject to conditions⁸ similar to those imposed under parole.

Recommendations

At the time the court makes a finding that a person is NGMI, Legal Aid NSW recommends that it should also determine nominal terms that are the equivalent to both the non-parole period and sentence that would have been imposed if the person had been found guilty of the offence charged and a sentence imposed.

Legal Aid NSW proposes that from the time that the person is found NGMI until the completion of the nominal non-parole period, the current position is preserved and the MHRT can only release the person if section 43 is satisfied.

Legal Aid NSW submits that thereafter the presumptions should be that the person be released in the following sequence:

- conditional release at the completion of the nominal non-parole period, and
- unconditional release at the end of the sentence period.

⁸ *Mental Health (Forensic Provisions) Act (1990)*

This does not derogate from the MHRT's current powers to conditionally or unconditionally release a person prior to the expiry of their nominal terms.

Reversing the legal presumption does not mean release will be granted by the MHRT where the safety of the public will be seriously endangered.

However, persons detained in these circumstances will have two identifiable future points in time which will trigger review of their detention. At present, having no review date means that persons who are detained have little motivation to aim for self-improvement.

In our experience, patients often experience feelings of hopelessness and express regret that they pleaded NGMI, as opposed to pleading guilty. A guilty plea would at least have provided temporal certainty, albeit after serving a term of imprisonment in a correctional centre with no possibility of release prior to completing the non-parole period.

Recommendations

1. At the time the court makes a finding that a person is NGMI, the court should also determine nominal terms that are the equivalents to both the non-parole period and head sentence that would have been imposed if the person had been found guilty of the offence charged after a trial.
2. Maintain the test for release prior to the nominal non-parole period for patients found NGMI.
3. A new test should be created which applies when the nominal non-parole period is complete in the following terms: *Where a person is detained in a mental health facility, correctional centre or other place, at the completion of that person's nominal non-parole period the MHRT must order the person be conditionally released from detention, unless any member of the public will be seriously endangered by the person's conditional release.*
4. Create a new test that applies when the nominal sentence expires in the following terms: *Where a person is detained in a mental health facility, correctional centre or other place or subject to conditional release, at the expiry of that person's nominal sentence the MHRT must order the person's unconditional release, unless any member of the public will be seriously endangered by the person's unconditional release.*

Limiting term

The issues

In New South Wales, people are found unfit to stand trial in accordance with the *Presser* criteria.⁹ Where they are found to have committed the offence at a special hearing they may be made subject to a limiting term. Upon being found unfit, the person is classified as a forensic patient¹⁰ and may be detained in a mental health facility, correctional centre or other place at the conclusion of the special hearing.

The purpose of the special hearing is to determine whether the patient committed the offence charged, and if so, the penalty.¹¹ Where the court finds that a sentence of imprisonment would have been imposed had the special hearing been a normal criminal trial, then the court sets a limiting term that is the equivalent of the sentence.¹²

The patient is deemed to have defended the matter¹³ and so there is no sentencing discount for a plea of guilty. A non-parole period is not set as part of the limiting term.

During the last six months of the person's limiting term the Minister may seek an extension of the patient's forensic status for a period of up to five years. Further extensions may be sought and there is no limitation on the number of extensions that may be sought and granted.¹⁴

A person subject to an extension order remains a forensic patient and under the jurisdiction of the MHRT. In accordance with section 43 of the Act (*ante*), where the person is detained, the presumption is that detention will continue unless that presumption is rebutted.

For the duration of an extension of a patient's forensic status the MHRT determines whether they are to be detained or conditionally released. However, the MHRT may not order unconditional release of a patient subject to an extension order as this may only be ordered by the Supreme Court of NSW.¹⁵

At the point at which the equivalent non-parole period during a limiting term is completed, the statutory presumption is for detention to continue rather than for conditional release to be ordered.

Anecdotally, we observe that the release of patients is measured from the end of the limiting term. However, the legislation is premised on release following consideration of factors including the safety of the public, the safety of the patient and whether the patient has spent sufficient time in custody.¹⁶ In our experience, this invariably means that discharge planning, including accommodation and community based care, are neither sought nor implemented until close to the expiry of the limiting term. Consequently, the patient is not given the opportunity to re-enter the community with the safety and confidence that follows conditional release.

⁹ *R v Presser* (1958) VR 45.

¹⁰ *Mental Health (Forensic Provisions) Act* (1990) s42 (a) (i).

¹¹ *Mental Health (Forensic Provisions) Act* (1990) s23.

¹² *Mental Health (Forensic Provisions) Act* (1990) s23.

¹³ *Mental Health (Forensic Provisions) Act* (1990) s21 (3) (a).

¹⁴ Schedule 1 *Mental Health (Forensic Provisions) Act* (1990)

¹⁵ *Mental Health (Forensic Provisions) Act* (1990) Sch 1.

¹⁶ Section 74(e) *Mental Health (Forensic Provisions) Act* (1990)

Recommendations

Legal Aid NSW recommends that the court imposing a limiting term should also determine a nominal non-parole period that is the equivalent of a non-parole period had the patient been subject to a normal trial and received a custodial sentence.

When that nominal non-parole period is complete, Legal Aid NSW recommends that the presumption should be that the patient be conditionally released to the community. The test for conditional release should not be the current negative test contained within section 43 of the Act. Where the presumption to release is rebutted because evidence persuades the MHRT that the community will be seriously endangered by the patient's release, detention will continue.

Legal Aid NSW submits that incorporating a temporal limit within the limiting term will assist those detaining the person in seeking community support for release and reintegration in a controlled manner under conditions of release. This will lessen the tendency for patients to remain detained until the expiry of their limiting term.

Currently, when discharged into the community these patients often do not receive the support that accompanies conditional release. The reintegration into community living is not undertaken in a controlled manner, observed by risk management professionals and subject to revocation upon breach.¹⁷ As a consequence, Legal Aid NSW submits that where a person remains detained until the end of their limiting term there is an increase in the likelihood that an extension of their status as a forensic patient will be sought.

In practice, the patient remains detained while the application for an extension order is considered by the Supreme Court, which can take up to three months from the expiry of the patient's limiting term.¹⁸ Although possible, release from detention during that three month period generally does not occur as those detaining the patient and those who might provide community care and treatment are unable to determine whether the person will ultimately be released and, if so, whether they will be subject to conditions.

Recommendations

1. At the special hearing the court imposing a limiting term should also determine a nominal non-parole period that is the equivalent of the patient's non-parole period if there had been a normal criminal trial.
2. The current test for release prior to completion of the nominal non-parole period for patients subject to a limiting term should be maintained.
3. A new test should be created which applies when the nominal non-parole period is complete in the following terms: *Where a person is detained in a mental health facility, correctional centre or other place, at the completion of that person's nominal non-parole period the MHRT must order the person be conditionally released from detention, unless any member of the public will be seriously endangered by the person's conditional release.*

¹⁷ *Mental Health (Forensic Provisions) Act (1990) s68.*

¹⁸ *Mental Health (Forensic Provisions) Act (1990) Sch 1 Cl 11.*

Foreign nationals found NGMI and without access to social security

The issues

An increasing number of foreign nationals are found NGMI for serious offences such as murder. They are detained in high secure forensic facilities such as the Forensic Hospital at Malabar, funded by Justice Health, the only high secure forensic facility in New South Wales.¹⁹ At the time the offences were committed, the immigration status of these patients allowed them to remain in Australia for a limited time, for example on a student or holiday visa.

These patients are unable to progress from the high secure environment to a medium secure unit (MSU) notwithstanding expert opinion that medium secure care is appropriate on both clinical and risk grounds. Medium secure care involves increasing amounts of leave, which help the patient re-enter the community in a safe and monitored manner. Foreign national patients are not granted any leave, except to attend medical appointments while detained at the Forensic Hospital. These patients are generally not suitable for return to their country of origin as they have not undertaken the rehabilitation that accompanies care and treatment provided at a MSU.

In New South Wales there are three MSUs. These facilities are controlled and financed by their Local Health Districts. The MSUs will not accept foreign national patients because they are impecunious, they have no access to social security benefits and their pathway toward community living is unknown because of their immigration status.

This means that foreign national patients are detained indefinitely in highly secure facilities despite there being no clinical or risk basis for that type of detention.

Recommendations

The recommendations already outlined regarding the court ordering nominal terms for patients found NGMI will create an impetus for these patients to progress beyond continued detention in highly secure facilities and therefore, mitigate the risk of indefinite detention. Nominal periods create temporal points in the person's detention.

At those points in time Legal Aid NSW recommends that the presumption should be that the person is released into the community, initially subject to conditions and, thereafter unconditionally. The patient will not be released from detention if the presumption is rebutted.

¹⁹ Formally titled, *Justice Health & Forensic Mental Health Network* is a Statutory Health Corporation established under the Health Services Act (NSW) 1997 and is funded by NSW Ministry of Health.

Safety of the patient

The issues

Currently, a patient may be continuously detained because the MHRT is not satisfied that the safety of the patient, as well as the safety of the public, will not be seriously endangered if they are released.²⁰ The person is classified as a forensic patient because they have committed an offence, rather than self-harmed.

The MH Act provides a civil framework for the care, protection and treatment of people at risk of self-harm.²¹ The legislation includes detention and coercive measures. The MH Act applies when a person is found to be mentally ill, as defined. Where the MHRT finds a person to be mentally ill and orders the person to be detained, they are classified as an involuntary patient.

Section 4 defines an involuntary patient as:

- (a) *a person who is ordered to be detained as an involuntary patient after a mental health inquiry or otherwise by the MHRT, or*
- (b) *a forensic patient who is re-classified as an involuntary patient under section 53 of the Mental Health (Forensic Provisions) Act 1990, or*
- (c) *a correctional patient who is re-classified as an involuntary patient under section 65 of the Mental Health (Forensic Provisions) Act 1990.²²*

Currently, a forensic patient may be classified as an involuntary patient during the last six months of the applicable limiting term. Upon the MHRT making that finding, the person ceases to be classified as a forensic patient and may be taken to a mental health facility for care, treatment or control.²³

Before that point, a forensic patient subject to a limiting term or a patient found NGMI may be detained on the basis that the MHRT is satisfied that the safety of the patient will be seriously endangered if they are released.²⁴

Recommendation

Legal Aid NSW recommends that a person classified as a forensic patient should be subject to the same civil legislative mechanism contained within the MH Act where the concern is for their own safety. This test should apply from the point of the finding of NGMI and throughout the limiting term.

²⁰ *Mental Health (Forensic Provisions) Act (1990) s43 (a).*

²¹ *Mental Health Act (2007)*

²² *Mental Health Act (2007) s4.*

²³ *Mental Health (Forensic Provisions) Act (1990) s53.*

²⁴ *Mental Health (Forensic Provisions) Act (1990) s43 (a).*

Recommendation

Legal Aid NSW recommends that section 43 of the Act be amended to prevent continued detention on the basis that the MHRT is satisfied that the safety of the patient only will be seriously endangered if they are released.

Term of reference 1(j)

- j. The availability of pathways out of the criminal justice system for individuals with cognitive and psychiatric impairment.

The objects of the Act are to provide the care, treatment and control of persons subject to criminal proceedings who are suffering from a mental illness or mental condition.^{25 26}

The least restrictive care principles of the MH Act apply to forensic patients with mental illness or mental disorder.²⁷ However, barriers to patient pathways from detention create a risk of indefinite detention. This is best illustrated by reference to some of the most common circumstances of our clients.

Patients profile

Demographics

Patients are often from socially and economically disadvantaged backgrounds experiencing factors such as unstable housing, unemployment, foster care and drug and alcohol abuse. Many also experience intellectual disability, trauma and illiteracy. Some are from culturally and linguistically diverse backgrounds with poor English skills.

Diagnostic

Psychotic disorders are rarely the only mental disorder that a patient experiences. Often patients carry comorbid diagnoses including neurodevelopmental disorders, substance use disorders, alcohol use disorders, personality disorders, traumatic brain injury and neurocognitive disorders.

Model pathway for patients

After being found NGMI or subject to a limiting term, patients are usually detained in a correctional centre where they are placed on a waiting list for admission to the Forensic Hospital.

²⁵ Mental Health (Forensic Provisions) Act s 40

The objects of this Part are as follows:

- (a) to protect the safety of members of the public,
- (b) to provide for the care, treatment and control of persons subject to criminal proceedings who are suffering from a mental illness or mental condition,
- (c) to facilitate the care, treatment and control of any of those persons in correctional centres through community treatment orders,
- (d) to facilitate the provision of hospital care or care in the community through community treatment orders for any of those persons who require involuntary treatment,
- (e) to give an opportunity for those persons to have access to appropriate care.

²⁶ Mental Health (Forensic Provisions) Act s 3

²⁷ Section 68 of the Mental Health Act 2007 sets out general principles with respect to the treatment of all people with a mental illness or mental disorder.

The Forensic Hospital is a 135 bed high security hospital that provides specialist care for high risk civil patients and mentally ill patients who have been in contact with the criminal justice system.

Patients then move to medium secure units (MSUs) to continue with their rehabilitation after their mental state has stabilised. There are only three MSUs in NSW with less than one hundred beds in total. These are:

- Bunya Unit, Cumberland Hospital which has twenty four beds (male and female);
- Kestrel Unit, Morisset Hospital which has 30 beds (male);
- Macquarie Unit, Bloomfield Hospital which has twenty beds²⁸ (male only at present).

There are also cottages attached to some of the MSUs which provide patients with transitional placements between in-patient MSU care and community placements.

The MHRT Annual Report 2014-2015 records the number of forensic patients (forensic and correctional) at 422 in 2013-2014. In 2014-2015 the figure was 448. It is not unusual for a forensic patient to be detained in a correctional centre for approximately two years while waiting for admission to the Forensic Hospital.

Legal Aid NSW submits that there is an evident need to increase the number of high secure and medium secure beds to reflect the rising number of forensic patients, as well as a need to increase the number of community placement options to allow greater turnover of these beds.

There are limited numbers of Housing Accommodation Support Initiative (HASI) or HASI Plus packages for forensic patients who are ready to be conditionally released to live in the community.

The Ageing Disability and Home Care (ADHC) Community Justice Program (CJP) may be available to support forensic patients with intellectual disabilities who are in the complex needs and higher risk category.

Pathways available to patients with various cognitive impairment and psychiatric diagnoses

Psychotic disorder (mental illness)

Our experience is that the current care, treatment and least restrictive care pathway works well for patients with psychotic disorders (mental illness) who do not have complex comorbid substance disorder or personality disorder issues. This is illustrated in the following two case studies.

²⁸ *Forensic Mental Health Policy* PD2012_050, at 3.3.1 – 3.3.3

Case Study

A cognitively intact young male forensic patient with the diagnoses of schizoaffective disorder and poly substance abuse (in remission) was able to progress through the Forensic Hospital to a MSU and was granted unsupervised overnight leave within four years from the date of the NGMI verdict.

Case study

A male forensic patient with the diagnoses of schizophrenia and post-traumatic stress disorder (in remission) has been on conditional release for 8 years. With the support of his community mental health team, he works and lives with his partner and young child and has not re-offended.

Other diagnoses and complex presentations

For patients with personality disorders, cognitive impairment, substance use disorders or psychiatric disorders that do not fit into a strict mental health pathway, detention under the Act and MH Act can be indefinite. This is illustrated by the following case studies.

*Alcohol and personality issues***Case study**

A male NGMI forensic patient in his mid-forties had diagnoses of alcohol use disorder (in remission) and personality disorder. His index offences were property offences that occurred in 1993. The NGMI verdict was delivered in 1994.

He was granted conditional release three times but all releases were revoked, the last in 2005. Reasons for revocation included the patient not staying at the agreed address, heavy drinking and losing contact with his treating team. After spending six years at the Forensic Hospital, he was transferred to a MSU for two years, but he was recently transferred back to the Forensic Hospital.

This patient has spent 23 years as a forensic patient with at least 11 years in detention.

At his most recent review, the MHRT specifically acknowledged that the difficulties in managing him in a medium secure setting were largely because of the destabilising effect of his personality style on fellow patients, and the need to find an alternative pathway for him into the community.

The positive aspects of providing assertive psychiatric, medical and psychological treatment to support a forensic patient in this case has arguably been undermined by the uncertainty of indefinite detention and lack of progress via an appropriate pathway.

The risks of serious endangerment for this patient lie in his personality issues. It is going to be very challenging for him to move from the maximum secure Forensic Hospital under the current mental health rehabilitation pathway. Legislative change that triggers early release planning and finding an alternative rehabilitation pathway would benefit patients such as this.

Personality disorder/Limiting term forensic patient re-classified as civil involuntary

Case study

An Aboriginal female ex-forensic patient has key diagnoses of intellectual disability, severe personality disorder, antisocial personality disorder, schizophrenia and attenuated psychosis syndrome. She is at chronic risk of harm to herself and others. She suffered significant early childhood abuse and was placed in a number of foster homes.

She was re-classified as a civil involuntary patient before the end of her limiting term in 2012. Her risks of serious harm mainly stem from the personality disorder and psychotic episodes, especially when under extreme stress.

She has been in detention for seventeen years.

Release planning started when she was re-classified as a civil involuntary patient. ADHC and Justice Health met to develop a specific secure accommodation model for her. ADHC assessed her as in a very high risk of violent re-offending category. There is currently no suitable service model within the CJP that can adequately mitigate her level of risks and her support needs. ADHC has recommended her case be considered by the Complex Health Panel to develop a secure medical/nursing model of accommodation for her.

Her challenging behaviour has continued to the extent that she is now managed in two seclusion rooms at the Forensic Hospital, and has been subject to one-to-one observation for more than a year. She has periods out of her seclusion rooms when she is stable and able to engage therapeutically with staff. However, the risk of violence continues to be high.

The report for her most recent MHRT review states her treating doctor's opinion that clarity of an alternative ADHC placement would benefit her. Discussion about the lack of progress and uncertainty around an alternative placement at the MHRT hearings, contributed to a period of emotional dysregulation.

This case highlights that the uncertainty of indefinite detention can undermine the positive aspects of assertive psychiatric and psychological treatment.

There is a real need to develop a specific pathway for return to the community for patients with personality disorders. Without this, indefinite detention in the maximum secure hospital with one-to-one supervision is the only management option for this group of patients. It does not fulfil the rehabilitative objects of the MH Act.

Intellectual disability/head injury

Case study

A male forensic patient with major neurocognitive disorder as the result of traumatic brain injury and intellectual disability was conditionally released by the District Court.

Neurocognitive results indicated that his intellectual functioning is within the extremely low range. He has cognitive deficits in attention, concentration, memory, learning, reasoning and executive functioning. He is fixated with the idea that the relatively minor index offence occurred in the context of him trying to help rather than to harm. His cognitive impairment means that this fixation cannot be shifted. He repeatedly failed to turn up for his appointments with his treating team, which was a mandatory condition of his conditional release.

He breached his conditional release three times in three years for repeatedly failing to attend treating team appointments. On each occasion he was detained in hospital for between one and three months. His treating team has tried a number of ways to encourage and facilitate his attendance to appointments, to no avail.

Both the MHRT and the Community Forensic Mental Health Service recognise the impact of his cognitive impairment on his ability to comply with his conditional release orders. Under the current legal framework, even though he committed a relatively minor offence, it will be difficult for him to ever be unconditionally released because of his inability to comply with his order.

At present, his treating team for conditional release is a mental health team. A guardianship order is not appropriate to assist with bringing a forensic patient to attend case manager appointments under a conditional release order. Disability service providers may be better trained to manage patients with intellectual disability on conditional release.

A simpler set of conditions in the conditional release order would also make it easier for this group of patients to comply.

Elderly with cognitive impairment/Limiting term extension order

Case study

An elderly forensic patient with cognitive impairment, alcohol induced dementia and a history of major depression was detained in a prison hospital during his limiting term because of his medical and mental health needs. His treating team secured a nursing home placement for him at the end of his limiting term. The Minister for Mental Health applied to the Supreme Court to extend his forensic patient status a week before the end of his limiting term. The Supreme Court extended his forensic patient status for two years.

The risk of indefinite detention for this group of patients has multiple causes.

NSW Department of Corrective Services programs that address offending behavior, for example for anger management, drug and alcohol and sex offenders programs, are not available to patients detained in a prison hospital. The patient's medical and mental health conditions preclude them from moving to the main gaol to participate. The patient's cognitive impairment also makes them unsuitable for any rehabilitation programs.

This group of elderly patients are often estranged from their family. A less restrictive pathway for them would be a transfer to a MSU or to live in the community on conditional release in an aged care facility. However, suitable candidates for MSUs are patients with relatively intact cognitive functioning who can benefit from rehabilitation programs, factors which do not apply to this group of elderly patients.

Aged care facilities are commercial entities. Only a very small number of them are willing to accept forensic or ex-forensic patients.

The legal presumption in the Act is against release from detention. This group of patients do not fit into the mental health rehabilitation model pathway. Conditional release usually occurs after a period of leave at a MSU.

This group of patients are usually detained until the end of their limiting term, then released to a nursing home with a Public Guardian appointed to deal with issues such as accommodation, healthcare, and dental and medical consent.

If an extension order is sought, there is no evidence of safe and effective management in the community as these patients have never been conditionally released.

A legislative change that reverses the presumption to continue detention after a nominal period of the limiting term would provide a trigger for the treating team to start release planning earlier.

Medical condition (epilepsy, paraplegic)

Case study

A forensic patient had diagnoses of schizophrenia, major depressive disorder and post-traumatic stress disorder, and is a paraplegic. He also requires an interpreter in order to communicate with his treating team which makes mental state and risk assessments more difficult.

He has been detained in the medical ward of a prison hospital. He has reportedly been aggressive to nursing staff attending to personal care and when he has been moved. It is unclear whether language difficulties have contributed to the reported aggression. His high care needs and communication difficulties require special attention when formulating his pathway out of care.

Forensic patients with a medical condition are managed either in a mental health ward of a hospital, the Forensic Hospital or at a MSU. It has been challenging to provide a pathway out of detention for this vulnerable group of patients.

Case study

Pathways out of detention to a less restrictive setting for forensic patients with complex medical conditions like epilepsy is also challenging and in our experience, less established. This group of patients often have relatively stable mental state during seizure free periods.

However, management of their epilepsy and/or addressing any criminogenic issues rather than management of symptoms of mental illness is the key to mitigating the risk of serious endangerment.

Women:

At present, only one medium secure unit accepts female forensic patients in NSW. There is only one ward in the Forensic Hospital for female patients. It is difficult for the female patients to have a sense of progress, despite doctors endorsing their suitability for MSU. This may result in prolonged detention.

Term of reference 1(n)

- n. The prevalence and impact of indefinite detention of individuals with cognitive and psychiatric impairment from Aboriginal and Torres Strait Island and culturally and linguistically diverse backgrounds, including the use of culturally appropriate responses.

The following case studies illustrate the issues that may arise with clients from indigenous backgrounds or from overseas with culturally diverse backgrounds.

Aboriginal

Case Study

An Aboriginal patient originally from Queensland was found NGMI in 2001 for a relatively minor offence in 1999. He has been detained in prison and hospitals for 17 years. He was transferred to the Forensic Hospital in 2010, then to Bloomfield Hospital in 2013.

When he was at the Forensic Hospital, he wanted to be transferred to a mental health facility in Queensland. However, this was not possible because there is no agreement for transfer of forensic patients between New South Wales and Queensland.

He then wanted to be conditionally released to live with his brother who is a pastor living in Sydney, and to be supported by the Aboriginal Medical Service. His mental state was being stabilised at that time. These plans did not eventuate.

We understand that there is no dedicated Aboriginal liaison officer at the Forensic Hospital although an Aboriginal social/welfare worker has set up a yarning group that the Aboriginal patients enjoy. An Aboriginal worker at the Bloomfield Hospital connected this patient with some culturally appropriate activities and a group in Orange with connections to his people. Reconnecting with his people provided him with motivation and improved his self-esteem. His rehabilitation has flourished since then.

He has since been transferred to a mental health hospital in Sydney where he can be close to his brother and sister. At his last MHRT review hearing, he was granted supervised overnight leave to stay at his brother's home.

This case highlights the critical need for culturally appropriate services to avoid unnecessary prolonged detention for Aboriginal patients.

Culturally and Linguistically Diverse Community

Case study

This patient arrived in Australia in 1990 and applied for a Protection Visa in 1991. His wife and children remained in his home country the country. His Protection Visa application was declined on the ground that he could return to his country of origin. His country of origin was not his home country but the country in which he lived after fleeing his home country. However, he had no support in or ties to the country of origin. He was not a citizen of his home country.

A review of the decision of the Immigration Minister was commenced.

The patient received a NGMI verdict in 1994. In 2009, he was granted conditional release to live with his sister. His sister's business failed and she lost her home. As he could no longer live with his sister he was in breach of a condition of release and his conditional release was revoked in 2012.

Detention at a mental health hospital was the only placement for him. He was diagnosed with multiple myeloma.

Legal Aid NSW assisted the patient to obtain a special category visa that allowed him to receive Medicare and a small allowance. However, because of his immigration status, he was unable to receive any Commonwealth benefits and was ineligible for public housing, even as a resident on another person's lease. He was also ineligible for any services by ADHC, any aged care services and most homeless services.

Return to his home country was problematic because of his physical health and his non-citizen status. In addition, the home country has very few psychiatric services and, according to a report published by the World Health Organisation in 2012, only two fully qualified psychiatrists in the public health system.

In February 2015, his multiple myeloma became worse and he expressed a desire to return to his home country to die. His reasons were that he wanted to see his family and, importantly, to receive the appropriate Buddhist rites that could only be performed by his family on his death.

To obtain travel documents for return to his home country, he required documentation about his marriage and children and letters from his Village Administration Committee accepting him for residence. He also needed documentation from a suitable psychiatric facility indicating that he would receive treatment. His wife provided the documentation in May 2015.

Negotiations were entered into between Legal Aid NSW, the mental health hospital concerned, the Department of Immigration and the International Organisation of Migration.

His wife and one son visited him in September 2015.

Negotiations were still under way when he died in February of 2016. This case study highlights the particular complexity of forensic patients who are foreign nationals from less developed jurisdictions and whose circumstances are complicated by cultural and linguistic factors.